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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 727

THE SHAMROCK OIL AND GAS CORPORATION, PETITIONER,

VS.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF OF PETITIONER, THE SHAMROCK OIL AND GAS CORPORATION.

R. C. JOHNSON,
JOSEPH B. DOOLEY,
R. E. UNDERWOOD,
R. A. WILSON,
W. M. SUTTON,
All of Amarillo, Texas,
Counsel for Petitioner.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Shamrock Oil and Gas Corporation, petitioner herein, respectfully submits that the judgment of the Honorable Circuit Court of Appeals for the Fifth Circuit rendered on the 6th day of December, 1940, in this cause should be reversed and the judgment and ruling of the United States District Court for the Northern District

of Texas, Amarillo Division, should be affirmed for the reasons hereinafter advanced.

Opinions of Courts Below.

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court, when motion to remand was overruled, appears at page 108 of Record.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, rendered on December 6th, 1940, appears at page 127 of Record and is reported in 115 F. (2d) at page 880.

Grounds on Which Jurisdiction Is Invoked.

The nature of the case presented is set out in the Statement of Case which follows in this brief. The judgment to be reviewed was rendered on the 6th day of December, 1940 (R. 134) by the United States Circuit Court of Appeals, Fifth Circuit. Such judgment reversed the ruling and decision of the United States District Court for the Northern District of Texas (R. 93), and remanded this cause to such court with instructions to remand same to the State Court from which it was removed. A petition for rehearing was filed December 26th, 1940 (R. 136) and same was denied January 14th, 1941 (R. 145). Petition for writ of certiorari was presented herein on January 30th, 1941. Such petition was granted March 10th, 1941, but the review was limited to the first question presented in such petition. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as Amended by Act of February 13th, 1925, c. 229, Section 1 (43 Stat. 938; 28 U. S. C. A. Section 347). The case of *Gay* v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099, 54 S. C. 608, supports jurisdiction.

STATEMENT OF CASE.

The first question presented in petition for writ of certiorari, and the question to which this review was limited when such petition for writ of certiorari was granted herein is as follows:

> "Whether a counter-claim or cross-action, set up by resident defendants in a State Court seeking damages against the original non-resident plaintiff in the amount of $7,200.00 for the alleged breach of a separate and distinct contract from the $5,390.42 indebtedness due on open account and originally sued upon, is a suit which is removable by the defendant in the cross-action (petitioner), who had been the original plaintiff, on the grounds of diversity of citizenship under Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71)?"

The petitioner, a Delaware Corporation, sued the respondents in the District Court of Potter County, Texas, on an open account in the amount of $5,390.42 for petroleum products sold and delivered respondents (R. 1-60). On the filing of a plea of privilege by respondents (R. 61) the venue of such suit was transferred to Parmer County, Texas (R. 62-63). The respondents filed their original answer in the District Court of Parmer County, Texas (R. 64). In such answer respondents did not question the correctness of the account, nor did respondents deny same under oath as required under Article 3736, Revised Civil Statutes of Texas as Amended 1931 (Note 1 Appendix) so as to entitle such respondents to question the correctness of such account. In such answer respondents alleged as a defense to such debt that the

products furnished to respondents were delivered under an agreement violating certain Texas statutes generally referred to as Anti-Trust Statutes (R. 65-67).

In the same pleadings originally filed in the District Court of Parmer County, Texas, the respondents filed their cross-action or counter-claim (R. 67-68) wherein such respondents, citizens of Texas, sought to recover damages against petitioner, a citizen of Delaware, in the amount of $7,200.00 for the alleged breach of contracts of a different date relative to the leasing of an automobile truck. The damages so sought to be recovered in the cross-action arose out of the alleged breach of contracts found by the trial court (R. 108) and the Circuit Court of Appeals (R. 127 at 128) to be separate and distinct from the indebtedness due petitioner and originally sued upon. Petitioner, as defendant in the cross-action, filed its petition for removal and removed the cause to the United States District Court for the Northern District of Texas, Amarillo Division, (R. 69-76) on the grounds (R. 69-70) that the cross-action presented a separate and distinct suit by respondents, citizens of Texas, against petitioner, a citizen of Delaware, for $7,200.00 damages. Respondents filed a motion to remand (R. 76) in which respondents admitted (R. 79) that the petition for removal was filed in the time required by law. The motion to remand was denied (R. 80) and an unreported opinion was rendered by the trial judge in open court (R. 108). Thereafter this cause proceeded to trial and after a trial on the merits a judgment was rendered for petitioner upon the suit presented by the original petition and the suit presented by the cross-action (R. 81). Respondents filed a motion for reconsideration of their motion to remand (R. 85-93). Such motion was overruled (R. 93). Respondents appealed to the United States Circuit Court

of Appeals for the Fifth Circuit from the order overruling their motion to remand and from the judgment of the Court overruling respondents' motion for a reconsideration of the Court's order overruling motion to remand (R. 103-107).

The United States Circuit Court of Appeals, Fifth Circuit, entered its judgment on the 6th day of December, 1940, reversing the judgment appealed from and remanded this cause to the trial court with instructions to remand same to the State Court from which it was removed (R. 134). An opinion was filed by such Circuit Court of Appeals on the 6th day of December, 1940, (R. 127), 115 F. (2d) 880. It was held by such Court that the petitioner, non-resident defendant in the cross-action filed in the State Court involving matters unrelated and wholly distinct from the indebtedness originally sued upon, was not a defendant within the meaning of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) and was NOT entitled to remove this cause to the Federal Court and that such statute did not authorize the removal of a cross-action or counter-claim for damages in excess of $3,000.00 involving the alleged breach of contracts distinct from the indebtedness originally sued upon. The petitioner filed its petition for rehearing on December 26th, 1940 (R. 136). Same was denied on January 14th, 1941 (R. 145). Petition for writ of certiorari was filed herein January 30th, 1941, and granted March 10th, 1941, but limited to the first question presented and above quoted.

SPECIFICATION OF ERRORS.

I.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in remanding this case and in holding that the cross-action filed by the respondents in the District Court of Parmer County, Texas, in which respondents, citizens of Texas, sought damages totalling $7,200.00 against petitioner, a citizen of Delaware, for the alleged breach of contracts separate and distinct from the indebtedness originally sued upon, was not a suit removable by the petitioner as a defendant, for the reason that such decision and holding incorrectly interprets Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) and is contrary to the weight of authority.

II.

The Honorable Circuit Court of Appeals erred in remanding this case and in holding that petitioner, a citizen of Delaware, was not entitled under the provisions of Section 28 of the Judicial Code as Amended, as defendant in the cross-action, to remove the cross-action or counter-claim filed by respondents, citizens of Texas, in the District Court of Parmer County, Texas, from such State Court to the Federal Court, for the reason that such holding and decision improperly interprets such statute and is contrary to the weight of authority.

ARGUMENT.

Point I.

Summary:

The Honorable Circuit Court of Appeals erred in holding that petitioner as the defendant in cross-action involving matters unrelated to the plaintiff's original suit was not entitled under the removal act as a defendant to remove the suit presented by the cross-action or counter-claim to the Federal Court.

Referable to Question I in Petition for Writ of Certiorari and quoted above under Statement of Case and Specification of Errors I and II, *supra.*

For brevity the argument under Specifications of Errors I and II will be combined under this point.

Argument and Authorities Under Point I.

The relevant portions of the statute involved herein, being a part of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71), is as follows:

> "Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State Court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such contro-

versy may remove said suit into the district court of the United States for the proper district."

The decision and holding of the Circuit Court of Appeals herein was to the effect that the counter-claim of the respondents was not a suit within such statute and the petitioner herein was not a defendant within such statute. The cross-action or counter-claim filed by the respondents sought affirmative relief for more than $3,000.00 on a matter unrelated to the verified account sued upon by petitioner.

Under Texas practice it is well established that a cross-action or counter-claim of the nature here involved is a suit, and that the one who denies or defends such cross-action or counter-claim is a defendant. The Texas rule upon such matters is clearly and correctly stated in 38 Texas Jurisprudence page 292, Section 6, as follows:

> "A cross-bill or cross-action, or a plea in reconvention, or a set off or counter-claim is, or occupies the same position as, an independent suit by the defendant in the original suit against the plaintiff. As to the matter asserted in his cross-action or plea the defendant is the actor or plaintiff; and he has the rights and responsibilities of a plaintiff; while the plaintiff in the original suit is a defendant, with the privileges of a defendant. In other words, each party is plaintiff in respect to his own particular grievance and each party is defendant in respect to the grievance of the other. There are two cases which may be tried together in the same proceeding or it has been said two actions are really combined into one."

Such text is amply supported by the authorities as illustrated in the following decisions:

> *Gimmel & Son* v. *Gomprecht & Co.*, (Tex. Sup. Ct. 1896) 89 Tex. 497, 35 S. W. 470.

Harris v. *Schlinke,* (Tex. Sup. Ct. 1901) 95 Tex. 88, 65 S. W. 172.

Peck v. *McKellar,* (Tex. Sup. Ct. 1870) 33 Tex. 234.

Ware v. *Jones,* (Com. of App. Sec. A Judgment Adopted by Tex. Sup. Ct. 1922) 242 S. W. 1022.

The same rule has been recognized and applied by this Honorable Court. In *Mason City & Fort Dodge Railroad Co.* v. *Boynton,* (1907) 204 U. S. 570, 51 L. Ed. 629, 27 S. C. 321, Justice Holmes said:

> "But this court must construe the act of Congress regarding removal. And it is obvious that the word 'defendant' as there used is directed toward more important matters than the burden of proof or the right to open and close."

In *Merchants Heat & Light Co.* v. *James B. Clow & Sons,* (1907) 204 U. S. 286, 51 L. Ed. 488, 489, 27 S. C. 285, it was said:

> "But by setting up its counter-claim, the defendant became the plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. It is true that the counter-claim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set off proper. But, even at common law since the doctrine has been developed, a demand in recoupment is recognized as a cross demand, as distinguished from a defense."

W. S. Kirby v. *American Soda Fountain Co.,* (1904) 194 U. S. 141, 48 L. Ed. 911, 24 S. C. 619.

The cross-action or counter-claim of respondents (R. 67) presented a claim whereby they sought damages

totalling $7,200.00 against the petitioner for the alleged breach of a contract relating to the leasing of an automobile truck. Such contract was allegedly made on a different date (R. 67) from that upon which the indebtedness to the petitioner was incurred (R. 42-59) and was an entirely separate and unrelated transaction, and the controversy thus presented was wholly unrelated to the indebtedness sued upon by petitioner, the correctness of which was not denied or questioned and which was thereby admitted under Article 3736 of the Revised Civil Statutes of Texas as Amended in 1931 (Note 1 Appendix). To prevail on the cause of action asserted by the cross-action or counter-claim the respondents would have to establish:

(1) The execution of the contract alleged;

(2) Breach of such contract by petitioner; and

(3) Amount of damages sustained by respondents as the result of such breach.

To entitle respondents to recover, these elements would have to be established without regard to whether the petitioner recovered, or failed to recover, a judgment against respondents on its cause of action for its indebtedness, or even if petitioner dismissed its cause of action against respondents. Petitioner respectfully submits that as related to such cross-action that it not only occupied the position of a defendant but was an actual defendant within not only the meaning and intent of the removal statute but also within the strict language of same. and was therefore entitled to remove the suit in controversy so presented to the Federal Court under the above quoted portion of the removal statute on the basis that such counter-claim presented a removable suit, or in any event a separable controversy.

Since the first enactment of Section 28 of the Judicial Code in substantially its present form in 1887, and amendment in 1888 (Act of March 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Act of August 13, 1888, c. 866, Sec. 1, 25 Stat. 433) more than twenty-five reported cases in the District Courts or Circuit Courts of Appeals have passed upon the right of a defendant to a cross-action seeking affirmative relief to remove such cross-action or counter-claim to the Federal Court. Twenty-one of these cases uphold or recognize the right of removal; five deny such right. The petitioner respectfully submits that the cases upholding the right of removal are the better reasoned cases. The Honorable Circuit Court of Appeals in its opinion herein (R. 129-130) recognizes that the majority of the decisions upon the question presented are contrary to its decision in the instant case. The decisions since 1915 upon the question presented have been uniform in upholding the right of removal. While these decisions are not binding, it is respectfully submitted that consideration should be given to the fact that so many able jurists of the inferior courts have, after fully considering the matter, concurred in their conclusions. The basis of such decisions can be illustrated by the following three quotations:

Bankers Securities Corporation v. *Insurance Equities Corporation,* (1936 C. C. A. Third Circuit) 85 Fed. (2d) 856 at 857:

> "When a counter-claim is filed, plaintiff becomes the defendant in the cause of action set forth therein, and this extends to removal proceedings from a State Court to a Federal Court."

American Fruit Growers v. *LaRoche,* (1928 D. C. S. C.) 39 Fed. (2d) 243 at 244:

> "If the defendant had brought his case against the plaintiff in the state court, there could be no

doubt about the right to a removal. When he filed his counter-claim in the case brought by the plaintiff, then, so far as the counter-claim is concerned, he became the actor and therefore the plaintiff; and the American Fruit Growers, Inc., became, as to the counter-claim, the defendant. In that aspect, the case is literally within the terms of the Removal Act (28 U. S. C. A. Section 71). In any aspect of the case, there can be no doubt but that the case is within the spirit of that act. It is only by the most technical reasoning, and by laying aside the actualities of the case and the real position of the parties, that the right to remove can be denied."

San Antonio Suburban Irrigated Farms v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579 at 581:

"The entire scheme of the Judiciary Act is to give a non-resident, who either sues or is sued for more than $3,000, the right to have his controversy determined in a national court. The right arose because of a then existing jealousy among the colonies, which has largely disappeared; the right is still of great value, because of the opportunity it affords non-residents to have their matters submitted to a jury not affected by local prejudices and favoritisms, a consideration which may unconsciously affect courts as well. It is not to be supposed that Congress intended that such right can be taken away by artifice or device; the law is uniform that parties will be realigned to get at the truth, and removal is granted or denied according to that realignment; that is, according to the real, and not the nominal, position of the parties. * * *.

"I do not believe that Congress intended that a valuable right should be denied because of the circumstance that the Kansas procedure permits a plaintiff as to one matter to become a defendant as to another, in the same case. Such denial would make the right given by Congress turn on form rather than

on substance; it would let the nominal prevail over the actual—would follow the letter rather than the spirit. Such construction seems to me to be opposed to the doctrine of realignment, of fraudulent joinder, and other accepted doctrines which cut through the bark to get at the tree."

The following decisions recognize or uphold the right of a defendant in a cross-action to remove such suit to the Federal Court where other jurisdictional requisities are present:

Bankers Securities Corporation v. *Insurance Equities Corporation,* (C. C. A. Third Circuit N. J. 1936), 85 Fed. (2d) 856.

Chambers v. *Skelly Oil Company,* (C. C. A. Tenth Circuit 1937), 87 Fed. (2d) 853.

Wichita Royalty Co. v. *City National Bank,* (D. C. Tex.) 18 Fed. Supp. 609, Affirmed (C. C. A. Fifth Circuit 1938) 95 Fed. (2d) 671; Affirmed by the Supreme Court without referring to the jurisdictional question, 306 U. S. 103, 83 L. Ed. 515.

Carson and Rand Lumber Co. v. *Holtzclaw,* (D. C. Mo. 1889) 39 Fed. 578.

Walcott v. *Watson,* (C. C. Nev. 1891) 46 Fed. 529.

Price & Hart v. *T. J. Ellis & Co.,* (C. C. Ark. 1904) 129 Fed. 482.

Hagerla v. *Mississippi River Power Co.,* (C. C. Iowa 1912) 202 Fed. 771.

Hansen v. *Pacific Coast Asphalt Cement Co.,* (D. C. Calif. 1917) 243 Fed. 283.

Chicago, M. & St. P. Ry. Co. v. *City of Spencer,* (D. C. Iowa 1922) 283 Fed. 824.

Consolidated Textile Corporation v. *Iserson,* (D. C. N. Y. 1923) 294 Fed. 289.

Pierce v. *Desmond,* (D. C. Minn. 1926) 11 Fed. (2d) 327.

Mohawk Rubber Co. of New York v. *Terrell,* (D. C. Mo. 1926) 13 Fed. (2d) 266.

Zumbrunn v. *Schwartz,* (D. C. Ind. 1927) 17 Fed. (2d) 609.

San Antonio Suburban Irrigated Farms v. *Shandy,* (D. C. Kan. 1928) 29 Fed. (2d) 579.

Evetts v. *Peoples Life Insurance Co.,* (D. C. Tex. 1929) 36 Fed. (2d) 832.

American Fruit Growers, Inc. v. *La Roche,* (D. C. S. C. 1928) 39 Fed. (2d) 243.

Houlton Savings Bank v. *American Laundry Machinery Co.,* (D. C. Me. 1934) 7 Fed. Supp. 858.

Groveville Sales Corporation v. *Stevens,* (D. C. N. J. 1936) 16 Fed. Supp. 563.

O'Neill Bros., Inc. v. *Crowley,* (D. C. S. C. 1938) 24 Fed. Supp. 705.

Baker v. *Keebler,* (D. C. Tenn. 1939) 29 Fed. Supp. 555.

C. I. T. Corporation v. *Ambrose,* (D. C. S. C. 1940), 36 Fed. Supp. 311.

The following cases deny on one ground or another the right of removal to a defendant in a cross-action:

Waco Hardware Company v. *Michigan Stove Company,* (C. C. A. Fifth Circuit 1899) 91 Fed. 289.

McKown v. *Kansas and Texas Coal Company,* (C. C. Ark. 1901) 105 Fed. 657.

Indiana Mountain Jellico Coal Company v. *Asheville Ice and Coal Company,* (C. C. N. C. 1905) 135 Fed. 837.

Illinois Central Ry. Co. v. *V. A. Waller & Co.,* (C. C. Ky. 1908) 164 Fed. 358.

Glover Machine Works v. *Cooke-Jellico Coal Company,* (D. C. Ky. 1915) 222 Fed. 531.

Apparently the only case involving the question here presented under the Judiciary Act of 1887-8 which has reached the Supreme Court is the case of *Wichita Royalty* v. *City National Bank, supra.* In the opinion of the trial court (1937 D. C. Tex.) 18 Fed. Supp. 609 at 610, it was stated:

> "It is too late now to defend the right of a plaintiff who begins action in the state court to remove to the national court if and when national questions arise. The courts have joined in a procession of opinions supporting that right. The few cases that were to the contrary at the beginning are decidedly in the minority." Cases cited.

This case was affirmed by the Honorable Circuit Court of Appeals for the Fifth Circuit in 1938, 95 Fed. (2d) 671. The question of the trial court's refusal to remand was directly passed upon and it was held that the action of the trial court in refusing to remand was correct. The decision of the Circuit Court of Appeals was affirmed by this Honorable Court, but no reference was made to the jurisdictional question presented by the motion to remand filed in the trial court, (1939) 306 U. S. 103, 83 L. Ed. 515, 59 S. C. 420.

The Honorable Circuit Court of Appeals in its opinion in the instant case seeks to distinguish its holding herein from its holding in the Wichita Royalty case (R. 130-131) on the grounds that in the Wichita case a federal question was involved. The petitioner respectfully submits that this is a distinction without a difference for as recognized by the Honorable Circuit Court of Appeals in each instance only the defendant would be entitled to remove. In this case as in the Wichita Royalty case a cross-action or cross-bill presented new and independent matters and the defendant in the cross-bill was the one who removed.

It is respectfully urged that the opinion and holding of the Honorable Circuit Court of Appeals herein, that the term defendant or defendants in the Removal Act is used in a technical sense and refers only to the party designated as the original defendant in the action, conflicts with the decisions and rulings of this Honorable Court as well as the cases above cited directly passing upon the question involved. In *Mason City and Fort Dodge Railroad Company* v. *Boynton,* (1907) 204 U. S. 570, 579, 51 L. Ed. 629, 633, 27 S. C. 321, this Honorable Court held that the word "defendant" as used in the Act was directed to more important matters than the burden of proof or the right to open and close. This Honorable Court has repeatedly held that under the Judiciary Acts of 1875 and 1887-8 (March 3, 1875 c. 137, Sec. 2, 18 Stat. 470; March 3, 1887, c. 373, Sec. 1, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 433) that in determining the right of removal, the parties should be realigned in accordance with the matter in dispute without regard to the position they occupy in the pleadings as plaintiff or defendant. *Removal Cases* (1879), 100 U. S. 457, 25 L. Ed. 593; *Brown* v. *Ironsdale,* (1891), 138 U. S. 389, 11 S. C. 308, 34 L. Ed. 987; *Wilson* v. *Oswego Township,* (1894), 151 U. S. 56, 63, 14 S. C. 259, 38 L. Ed. 70; *Merchants Cotton Press & Storage Co.* v. *The Insurance Company of North America,* (1894), 151 U. S. 368, 385, 14 S. C. 367, 38 L. Ed. 195, 204; *Mason City & Fort Dodge Railroad Co.* v. *Boynton,* (1907), 204 U. S. 570, 27 S. C. 321, 51 L. Ed. 629; *Venner* v. *Great Northern Railway Company,* (1908), 209 U. S. 24, 28 S. C. 328, 52 L. Ed. 666; *Niles-Bennett-Pond Co.* v. *Iron Moulders Union* (1920), 254 U. S. 77, 41 S. C. 39, 65 L. Ed. 145.

The decision of the Honorable Circuit Court of Appeals in holding that the Removal Act gives the right of

removal to an original defendant only likewise conflicts with the following decisions recognizing the right of a third party brought in by a cross-action to remove under our present Removal Statute:

Habermel v. *Mong,* (1929 C. C. A. Sixth Circuit) 31 Fed. (2d) 822, Writ of Certiorari denied, 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37.

Houlton Savings Bank v. *American Laundry Machinery Co.,* (1934 D. C. Me.) 7 Fed. Supp. 858.

Ellis v. *Peak,* (1938 D. C. Tex.) 22 Fed. Supp. 908.

The honorable Circuit Court of Appeals in its opinion cites the decision of the Supreme Court in *West* v. *City of Aurora,* (1868) 73 U. S. 18, 6 Wall 139, 18 L. Ed. 819, as being controlling in the instant case. The nature of the original action therein was not entirely clear but same appeared to be a suit for the recovery of the amount of interest coupons of certain bonds. The city (original defendant) filed an answer setting up defensive matters and subsequently filed additional paragraphs setting up new defensive matters and in each of such paragraphs prayed an injunction from further proceeding in any suit on the coupons or bonds. On the filing of these additional paragraphs plaintiffs dismissed their original suit and sought to remove the new matters to the Federal Court. The action was remanded. The Supreme Court held such action was proper. This case was decided under the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73), the pertinent part (Section 12) of such statute being as follows:

"That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the afore-

said sum or value of $500.00, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the case for trial into the next circuit court * * *" (Historical Note, 28 U. S. C. A. Section 71).

This decision of the Supreme Court has been distinguished from the question here presented on three distinct grounds by various Circuit Courts and District Courts. The grounds of such distinction are:

(1) The Act of 1789 and the present removal statute are materially different in that the Act of 1789 limited the right of removal to a defendant "who shall at the time of entering his appearance in such State Court * * *" file a petition for removal, while such requirement is not in our present Judicial Code. *Habermel* v. *Mong,* (1929 C. C. A. Sixth Circuit) 31 Fed. (2d) 822, Writ of Certiorari denied. 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37; *O'Neill Bros.* v. *Crowley,* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579; *Zumbrunn* v. *Schwartz,* (1927 D. C. Ind.) 17 Fed. (2d) 609; *Price & Hart* v. *T. J. Ellis & Co.,* (1904 C. C. Ark.) 129 Fed. 482.

(2) The so-called cross-action filed by the defendant in the *West* case presented defensive matters only and was merely supplemental proceedings ancillary to the main suit. *Ward* v. *Congress Construction Company,* (1900 C. C. A. Seventh Circuit) 99 Fed. 598; *O'Neill Bros.* v. *Crowley,* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579; *Pierce* v. *Desmond,* (1926 D. C. Minn.) 11 Fed. (2d) 371; *Hagerla* v. *Mississippi River Power Company,* (1912 D. C. Iowa) 202 Fed. 771; *Walcott* v. *Watson,* (1891 C. C. Nev.) 46 Fed. 529.

(3) The record in the *West* case, as pointed out by the Court therein, was so fragmentary as to be unintelligible. *O'Neill Bros.* v. *Crowley,* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579.

It is respectfully urged that the grounds of distinction of *West* v. *City of Aurora, supra,* are well founded and that such decision is not controlling herein, particularly because of the difference in the Judiciary Act of 1789 and that of 1887-8, the Act of 1789 limiting the right of removal to a defendant who filed his petition "at the time of entering his appearance in such State court".

It was submitted by the honorable Circuit Court of Appeals herein that in adopting the Judiciary Act of 1887-8 that Congress intended to adopt the construction of the Act of 1789 placed thereon by the Supreme Court in *West* v. *City of Aurora, supra.* Petitioner respectfully submits that such conclusion does not logically follow. It is true as pointed out by the Circuit Court of Appeals that the Supreme Court has on various occasions stated that the intent of Congress in adopting the Judiciary Act of 1887-8 was to restrict the jurisdiction of the Federal courts. This was accomplished, however, by limiting the right of removal to non-resident defendants, while under the Act of 1875 then in force either the plaintiff or the defendant could remove. While the intent of Congress to restrict the right of removal may be manifest, this will not authorize a court to ignore the plain meaning of language used in the Act. *City of New Orleans* v. *Mary Quinlan,* (1899) 173 U. S. 191, 43 L. Ed. 664, 19 S. C. 329. Where Congress, recognizing the interpretation placed upon the previous Act by the courts, changed the language in the enactment of the

Act of 1887-8, it has been stated that it can not be doubted that such change was deliberately made. *Fisk* v. *Henairie,* (1892) 142 U. S. 459, 35 L. Ed. 1080, 12 S. C. 207. Thus, it is submitted, the action of Congress in omitting from the Act of 1887-8 the provision in the Judiciary Act of 1789 that the defendant should "at the time of entering his appearance in such State court" file his petition for removal, which language was held by the Supreme Court in *West* v. *City of Aurora, supra,* to limit the right of removal to an original defendant under the Act of 1789 manifests an intent and desire on the part of Congress that the right of removal should not be limited to the original defendant.

In its opinion the honorable Circuit Court of Appeals refers to Section 29 of the Judicial Code (Section 72, Title 28 U. S. C. A.), being the procedural statute relative to removals, as prohibiting the removal of such a character of case as is herein presented. Petitioner respectfully submits that there is nothing inconsistent in such statute with the right of a defendant in a cross-action to remove. The relevant portion of such statute is as follows:

> "Whenever any party entitled to remove any suit mentioned in Section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending * * *."

It is submitted that where the defendant in the cross-action files his petition to remove at or before the time

required by the laws of the State or the rules of the State court to answer or plead to the declaration or complaint as presented by the cross-action or counter-claim that strict compliance with such statute has been effected. It will be observed that such statute is different from the Judiciary Act of 1789 which required the petition to be filed at the time of entering appearance.

There is no question in the present controversy but that the petitioner herein filed its bond and petition for removal before the time that it was required to answer or plead to the declaration or complaint of respondents, and that same was filed within the time required under Section 29 of the Judicial Code (Section 72, Title 28, U. S. C. A.), for respondents expressly admitted such fact in their motion to remand (R. 79). The District Court of Parmer County, Texas, convened on July 10th, 1939 (Section 69, Article 199, Revised Civil Statutes of Texas Note 2, Appendix). Petitioner as the defendant in the cross-action was not required to answer or plead to the cross-action filed by respondents on July 7th, 1939 (R. 64) before the second day of the term of the District Court of Parmer County (Article 2009, Revised Civil Statutes of Texas [Note 3, Appendix]), which would be July 11th, 1939. The petition and bond for removal was filed July 10th, 1939 (R. 71). It appears therefore that petitioner strictly complied with the statute regulating the time for filing petition and bond for removal, as is admitted by respondents.

The cases herein cited at page 14 of this brief which deny to a defendant in a cross-action the right to remove the cause to the Federal Court rely and are based upon the decision in *West* v. *City of Aurora, supra,* which decision for the reasons hereinbefore advanced is not controlling under the present removal statute in the contro-

versy here presented, and it is therefore respectfully submitted that the decisions in the cases representing the minority view should not be the rule of decision in this cause.

Conclusion.

For the reasons advanced herein it is respectfully urged that the judgment of the honorable Circuit Court of Appeals herein should be reversed and the judgment and decision of the trial court should be affirmed, for which relief the petitioner prays.

Respectfully submitted,

R. C. JOHNSON,
JOSEPH B. DOOLEY,
R. E. UNDERWOOD,
R. A. WILSON,
W. M. SUTTON,
All of Amarillo, Texas,
Counsel for Petitioner.

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of Counsel.

APPENDIX.

NOTE 1.—Article 3736, Revised Civil Statutes of Texas, as amended 1931:

"When any action or defense is founded upon an open account or other claim or claims for goods, wares and merchandise, including claims or suits for liquidated money demands based upon written contracts or based on business dealings between the parties, or for personal service rendered, on which a systematic record of said account has been kept, supported by the affidavit of the party, his agent or attorney, taken before some officer authorized to administer oaths, to the effect that such cause of action is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall, before an announcement of ready for trial in said cause, file a written denial, under oath, stating that such account is not just or true, in whole or in part, and if in part only, stating the items and particulars which are unjust; provided, that when such counter-affidavit shall be filed on the day of the trial the party claiming under such verified account shall have the right to continue such cause until the next term of court; when he fails to file such affidavit, he shall not be permitted to deny the account, or any item therein as the case may be."

NOTE 2.—Section 69, Article 199, Revised Civil Statutes of Texas:

"The 69th Judicial District of the State of Texas shall be composed of the counties of Parmer,

* * *, the terms of the district courts therein shall be held as follows: In the County of Parmer on the second Monday in June and July, and may continue in session three weeks; * * *."

NOTE 3.—Article 2009, Revised Civil Statutes of Texas:

"Where citation has been personally served at least ten days before the first day of the term to which it is returnable, exclusive of the day of service and return, the answer of the defendant shall be filed on or before the second day of the return term, and before the call of the appearance docket on said second day. * * *."

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